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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 318

W.R.B. CORPORATION, ET AL., d/b/a ROBERTSON CONSTRUCTION COMPANY, ET AL

Petitioners,

v.

ODELL GEER, d/b/a ODELL GEER COMPANY, AND P. H. (BERT) CAMP, d/b/a B.H.C. MATERIALS COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Respondent's Reply to "Jurisdiction"

In view of the very broad powers of this Court, Respondents do not, of course, contend that it lacks jurisdiction of this case, but they respectfully submit that the Court should not take jurisdiction because the sole question presented was not raised in the trial Court and was, in fact, effectively waived

by Petitioners. Furthermore, even in the absence of waiver, the question should be decided favorably to Respondents.

In the portion of the Petition styled "Questions Presented," Petitioners concede that the sole question offered for consideration is whether or not the "careful and experienced trial Judge"[1] committed reversible error in failing to order a complete hearing de novo before a successor Master when the original Master died after hearing evidence but before making his report. Petitioners contend that there was a denial of due process solely because the successor Master based his findings on the transcript of the evidence taken by the original Master, and did not personally see and hear the witnesses.

Respondents do not believe that this contention is correct as a general proposition of law, but it is never reached in this case because the record shows beyond peradventure that Petitioners waived any right they may have had to secure a de novo hearing. As will be shown under "Reply to Reasons for Granting the Writ,"[2] Petitioners in effect acquiesced in the order appointing the successor Master and in everything that was done pursuant to it. In fact, Petitioners even requested that additional findings and conclusions be made from the same record of which they are now complaining, and they did not complain of the failure to have a de novo hearing until they filed their brief in the Court of Appeals.

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[1] He is so described in the opinion of the Court of Appeals in this case (313 F. 2d 752).

[2] Infra, pp. 6-18.

In view of the circumstances the Court of Appeals correctly stated that

> "... (T) here is no basis for the belated charge now made before us that the District Court erred in not requiring a complete or partial rehearing of the evidence before the successor Master. . . . (313 F. 2d 752).

Such waiver, without more, was held sufficiently to distinquish the case at bar from *Smith v. Dental Products Co.*, 168 F. 2d 516 (7th Cir. 1948), upon which Petitioners rely.

Petitioners have not, however, cited any authority to the effect that it is a denial of due process for the trier of the facts to find them from a written record instead of hearing the witness testify. It is therefore believed that even in the absence of waiver the trial Court did not commit reversible error.

As stated, the question brought forward in the Petition was not presented to the trial Court, and Respondents respectfully submit that it would work a great injustice on them and would pervert the rules of ordinary procedure to grant the writ in order to rule on a question not fairly presented to the Trial Court.

Reply to "Questions Presented" and "Statement"

The portions of the Petition styled "Questions Presented" and "Statement" of the nature of the case do not include the controlling facts upon which the decision of the Court of Appeals was based. Its

opinion on the first appeal clearly shows that the Court held that, by their affirmative acts and their omissions in the Trial Court, the Petitioners waived any objection they might otherwise have had to the absence of a de novo hearing, and that in the Trial Court they evidenced a complete willingness for the transcript of the testimony taken before the first Master to be the sole basis for all fact findings.[3] Such findings by the Court of Appeals are abundantly supported by the record.

Suffice it to say at this point that Petitioners did not object to the order directing the successor Master to base his findings on the record which had already been made and on such additional testimony as he deemed it desirable to take; that they failed to offer any additional evidence or to request a hearing for that purpose; that they filed objections to the report of the successor Master on the ground of lack or insufficiency of evidence and requested additional findings from the record to which they are now objecting; that they attended the hearing on the report and made no objection to its being based on the original record; and that they made their first objection to such procedure when they filed their brief in the Court of Appeals.

Respondents call particular attention to the fact that after the reports of the successor Master were filed and copies had been delivered to all parties,

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[3] These findings will be set out in the "Reply to 'Reasons for Granting the Writ.'" Infra, pp. 6-18.

Petitioners filed objections to the reports in both cases, the first paragraph of such instrument filed by them in the Geer case containing the following language:

> "Now comes W. R. B. Corporation et al, Plaintiffs, . . . and objects to the Report of the Special Master . . ., and respectfully requests the Court to correct certain Findings of Fact and Conclusions of Law, *and to make additional findings of Fact designated herein, . . . and then to enter judgment upon said additional Findings of Fact, Conclusions of law, as plead for in Robertson's Pleadings on file herein.*"[1]

(R. 90)

There are then set out seventeen objections to the Special Master's Findings of Fact, all based on no evidence or insufficiency of the evidence. Following such objections are seven different and contrary findings of fact which Petitioners then requested the Trial Court to make. The instrument concludes with the following prayer:

> "Robertson Construction Company moves this Court to sustain its objections to the findings of the Special Master, *to make the additional findings requested herein, and to enter judgment in accordance with said corrections, findings and conclusions.*" (R. 102)

The objections filed by Petitioners in the Camp case were similar in language, outline, prayer and

[1] Unless otherwise noted, all italics in this brief are ours.

effect to those in the Geer case above set out. (R. 178-184)

At no time while the case was in the Trial Court did Petitioners indicate to the Court that they were dissatisfied with the evidence on which the report was based or with the fact that the successor Master did not himself see the witnesses. The trial Judge was entitled to believe, and assuredly did believe, that the only dissatisfaction Petitioners had with the report was in the findings the Master made and the conclusions he drew from them.

Reply to "Reasons for Granting the Writ"

Respondents respectfully submit that the Court of Appeals correctly held that if Petitioners ever had a tenable objection to the Master's reports on the ground that he did not see and hear the witnesses, they had waived any such objection. Such waiver is shown both by failure to object and by affirmative acts which were found and noted by the Court of Appeals in its opinion and which are fully supported by the record. The following facts are controlling:

1. *Failure to object to order appointing successor Master.*

> ". . . It was further ordered (by the trial Court) that the successor Master 'shall make a report to this Court of his findings of fact and conclusions of law based upon the evidence heretofore taken by the (original Master) and upon the record of such evidence with the power, however, to take any further evidence which (the successor Master) may deem neces-

sary.' No objection was made by any party to the appointment of a successor Master, the entry of this order or any of its terms. *Specifically no objection or exception was taken to the provision that the successor Master should determine the controversy on the basis of the existing record.* . . . " (313 F. 2d. 752).

By their failure to object to any of the provisions of the order Petitioners in effect agreed that the successor Master might base his report upon the evidence taken by the original Master, and the trial Judge was certainly entitled to believe that Petitioners were satisfied with the order.

2. *Several months elapsed between appointment of successor Master and filing of his reports, during which time Petitioners took no action.* "The successor Master, after consideration of the existing record—including the memorandum briefs and arguments previously filed—took the case under advisement. Several months thereafter he rendered a separate report in each case containing detailed findings of fact and conclusions of law. . . ." (313 F. 3d. 752).[3]

3. *Petitioners' failure to offer further evidence.* " . . . It was further ordered that the successor Master (should have) the power, however, to take any further evidence which (the successor Master) may deem necessary.' . . .

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[3] While the opinion does not give the exact dates, the record shows that the order appointing the successor Master was filed with the Clerk on October 18, 1961, and the Clerk promptly sent copies thereof to all counsel of record, but the Special Master's reports were not filed until over four months later, on February 21, 1962.

Although the order allowed the taking or retaking of further testimony, neither party offered any additional evidence, nor was any request made that hearings for such purpose be had. . . ." (313 F. 2d 752)

4. *Exceptions filed by Petitioners to Master's reports.*

"The successor Master . . . rendered a separate report in each case containing detailed findings of fact and conclusions of law. To each report the Contractor (the present Appellant)[*] filed numerous detailed exceptions.

These generally attacked the specific findings because not supported by sufficient or any evidence and because such findings were clearly erroneous. . . . *No exception or objection was urged that the successor Master had reached his conclusions based upon the prior record.* . . ." (313 F. 2d. 752).

Beyond any question the objections on other grounds to the Master's findings and conclusions constituted a waiver of any objection Petitioners may have had to the fact that they were based on the prior record.

5. *Petitioners' request for additional findings.*

" . . . . These (exceptions filed by Petitioners to the Master's reports) were also amplified by specific request for additional findings, conclusions of law, or both. . . ." (313 F. 2d 752).

Surely Petitioners' request for additional findings and conclusions from the same record they are now

[*] Petitioners in this Court.

attacking amounted to a complete approval of it and a consequent waiver of the right to object to its use as the basis for all fact finding.

6. *Attendance at hearing on Master's report and failure to object.*

> "The District Court thereafter held a hearing on the exceptions to the Master's report. This was attended by counsel and the successor Master. . . .
>
> It bears repeating that *at no time prior to the entry by the District Court of the order confirming the reports (except as modified) of the successor Master was objection or exception ever made by the Appellant (Petitioners)* . . . to his consideration and determination of the controversy on the basis of the initial existing record. . . ." (313 F. 2d 752).

7. *Failure to raise question in Trial Court.*

> " . . . Indeed, no such objections were made at any time prior to the filing of the brief in the consolidated appeals in this Court." (313 F. 2d 752).

It is too well settled to require argument or citation of authority that as a general rule the Trial Court is entitled to pass on all objections which a party may have to any portion of the proceedings and that such an objection comes too late if made for the first time in the Appellate Court. The Court of Appeals properly noted that the "careful and experienced trial Judge" would have provided for the appearance or re-appearance of any critical wit-

nesses for oral examination before the successor Master had either party requested it, and concluded that under the circumstances

> " . . . (T) here is no basis for the belated charge now made before us that the District Court erred in not requiring a complete or partial rehearing of the evidence before the successor Master. . . ." (313 F. 2d 752).

8. First request to the trial Court for de novo hearing came after remand of case for other purposes.

The Court of Appeals remanded the cause to the District Court in order to permit the trial Judge to examine the Master's findings and to determine whether or not they were "clearly erroneous" as provided in F. R. Civ. P. 53(e)(2). The narrow limits within which he was to operate after the case was remanded are shown by the concluding portion of the opinion of the Court of Appeals:

> " . . . (T) he final judgments must be vacated and the causes remanded for such determination of all the objections to the Master's reports which were raised and pending by any or all of the parties. . . . (313 F. 2d 753).

> " . . . (T)he Court is entitled to call on counsel for further written memoranda, briefs, and oral argument if desired to assist the Court in the study and consideration of this substantial record. . . . " (313 F. 2d 754).

Thus, the order remanding the cause permitted the Trial Court to pass on only those objections which had already been filed and to request counsel

to furnish only such "written memoranda, briefs and oral argument" as he might desire. Conspicuously absent is any mention of the filing of additional objections or the taking of further testimony. It was therefore entirely too late when the case got back to the Trial Court for Petitioners to file their motions for a de novo hearing.

It is apparent from the above that Petitioners not only made no objection to the Master's using the prior record as the basis for his findings and conclusions but that on the contrary they adopted it by requesting its use for further findings and conclusions. To hold that such conduct does not constitute a waiver, or does not constitute an implied agreement that the record made before the first Master be the sole basis for fact finding, would permit a litigant, as here, to refrain from requesting a de novo hearing or permission to offer further evidence before the successor Master, in the hope that findings favorable to him would be made by the Master, or if not, then by the Trial Court, in which event the litigant would accept the favorable findings and judgment thereon; but if such findings and judgment should be adverse to him, he would then call upon the Appellate Courts to set aside the entire proceedings and give him another chance.

Respondents have already called attention to the fact that the remand of the cases on the first appeal was for a very limited purpose, and that the Court of Appeals specifically overruled Petitioner's contention relative to a de novo hearing. The opinion makes it quite clear that no further testimony was to be

received, and that the only purpose of the remand was to make sure that the Trial Judge properly fulfilled his judicial function in ruling upon the objections to the Master's reports. Therefore the motion for a de novo hearing filed by the Petitioners in the Trial Court, after the remand, came after a complete waiver, and it was properly overruled by the Trial Court.

Petitioners apparently contend that a sine qua non for fact finding is the personal observation of the witnesses by the trier of the facts, and that this requirement cannot be waived. No authority is, of course, cited for this rather novel contention. It is conceivable that a case might be submitted to a court, a jury or a Master on depositions only, and that no party would offer to produce a witness to testify in person. Is it possible that under such circumstances the Petitioners would urge that their rights under the Fifth Amendment had been violated? Depositions and answers to interrogatories are quite often a part of the evidence in cases tried under the present rules, and it would seem that the only difference between such a case and this case is one of degree. In any case where depositions or answers to interrogatories are used the trier of the facts does not see or hear one or more of the witnesses.

For the sake of argument and further consideration of the cases cited by Petitioners, let it now be assumed that they had made objections to the order appointing the successor Master, Tom Conway, and had made timely demand in the Trial Court for a

de novo hearing, which had been refused, and let it be further assumed that Petitioners did nothing to waive such objections and demand. Respondents respectfully submit that, even in this event, the judgments of the Trial Court and of the Court of Appeals would be supported by the weight of authority and sound reasoning.

There are apparently only two cases which directly present or discuss the question of whether a de novo hearing is necessary when a successor Master is appointed to succeed a Special Master, appointed under Rule 53, who has heard the testimony but who dies or becomes incapacitated before making his report. Both cases are discussed in the Petition.

According to Corpus Juris Secundum, Vol. 35B, Page 220, the rule is that in such instances the Trial Court "may properly direct a successor Master to base his findings on the evidence taken by his predecessor." As authority for this statement one of the cases referred to is cited, namely, the District of Columbia Circuit Court case of *D. M. W. Contracting Co. v. Stolz*, 158 F. 2d 405, (hereinafter referred to as the *Stolz case.)* Petition for writ of certiorari in that case was denied by this Honorable Court. 330 U. S. 839, 67 S. Ct. 980, 91 L. Ed. 1286.

In the *Stolz case* the Master, (called "Auditor" in the opinion) who heard the testimony, died before making his report. The Trial Court appointed a successor and instructed him "to file his report upon the existing record." *The Appellants filed timely ob-*

jections to this order and requested a de novo hearing, which request was overruled. When the Master's report was filed, the Appellants filed exceptions thereto and a motion to suppress it for want of a de novo hearing, all of which the Trial Court overruled. The Trial Court then approved the Master's findings and entered judgment thereon. There was thus no element of waiver or acquiescence in the *Stolz case*, despite which fact the Court held that the report of the successor Master was legal and binding even though based solely on testimony of witnesses he had not seen or heard.

The opinion of the Court of Appeals in the *Stolz case*, affirming the judgment and holding that the order of reference was proper and that no further evidence was necessary, was not based alone on expediency, as Petitioners have stated on Page 9 of their Petition. On the contrary, the decision is based upon the Court's careful interpretation of Rule 53. After setting out the pertinent provisions of Rule 53, the opinion continues:

> "It appears from the foregoing that it is the trial court in such a case who makes the final determination of all the issues. The report of the master is advisory only and is without effect until confirmed by the court. For while he is charged with accepting the master's findings of fact unless clearly erroneous, it is necessary for him to review the transcript of the proceedings to determine if such error has been made, and when objection is taken to the report, as was done here, he is bound to review the transcript of the proceedings, evidence and exhibits to determine for himself whether the

master's report should be accepted, rejected wholly or partly, modified, recommitted with instructions, or whether he should receive further evidence. And in no instance is he bound by the master's conclusions of law. The effect is the same whether or not the parties consented to the reference.

"This being the case, it does not seem to us to be necessary to have the master who makes the findings hear the testimony and take evidence, and his report should be given the same effect as the report of a master before whom the entire proceeding took place." (158 F. 2d 407).

The other case which discusses this particular problem is *Smith v. Dental Products Co.*, 168 F. 2d 516 (7th Cir. 1948), relied on by Petitioners. That case does not stand for the proposition that after the death of a Master a de novo hearing before a successor Master is necessary. On the contrary, before that question was reached or discussed the Court of Appeals indicated, if it did not in fact hold, that the trial Court's judgment must be reversed because no findings of fact or conclusions of law were filed, as required by Rule 52.[1] No such situation is presented by the case at bar, for here the Master filed findings and conclusions, and they were approved by the Trial Court with some changes.

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[1] ". . . It is clear from these decisions that the requirement of the Federal Rules of Civil Procedure that the District Court make findings of fact and state conclusions of law must be reasonably complied with. . . . Clearly the ultimate finding of liability is not fair compliance and the failure of the District Court in this respect constitutes error under the facts of the case." (168 F. 2d 518).

Since no findings of fact or conclusions of law were made by a Master or by the Trial Court in the *Smith case*, it is quite obvious that anything which the Court said regarding the necessity for basing findings and conclusions on the testimony of witnesses seen and heard by the Master is necessarily dictum. The Court of Appeals in that case could not authoritatively state the essentials for making valid findings of fact and conclusions of law because that question was not before it.

So far as Respondents can determine, no petition for writ of certiorari was filed in that case. In view of the inexorable requirement of Rule 52 that findings and conclusions be filed and of the total disregard of such requirement by the Trial Court in the *Smith case*, it is easy to understand why no petition for a writ was filed to review the judgment of the Court of Appeals which reversed the trial Court's judgment.

The cases cited by the Court in the *Smith case* in support of its discussion of the personal appearance of all witnesses before a Master are readily distinguishable from the case at bar. It is noteworthy that none of them involved the identical situation presented by this case—the death or incapacity of a Master appointed under Rule 53 before making his report. In fact, in most instances the proceedings were administrative and not judicial. Thus, in *S. Buchsbaum & Co. v. Federal Trade Commission*, 153 F. 2d 85 (7th Cir. 1946), the original hearing was before an examiner, and neither he nor the Com-

mission itself had seen or heard the witnesses. In *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1935), the Secretary of Agriculture entered an order *without having heard or read any of the evidence* and without having heard the oral arguments or having considered the briefs. In fact, it appears from the opinion that "the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department." (80 L. Ed. 1293).

The vice in the order involved in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1936), was that the Commission had based its order fixing the value of the company's property in part on information secretly collected and never disclosed. No one would contend that the telephone company in that case had received the character of hearing to which it was entitled. On Pages 12-14 of the Petition for Certiorari petitioners cite several cases for the proposition that the findings of a Master should not be disturbed unless clearly erroneous. Respondents do not, of course, contend for a contrary rule.

Under Point 3 of their "Reasons for Granting the Writ," Petitioners say that the "clearly erroneous" test has not been applied to the Special Master's findings by the Trial Court and that it cannot be so applied because the Master who made the findings did not see and hear the witnesses. Respondents are unable to follow Petitioners' thinking on this point. The function of the trial Court to determine from the record whether or not the Master's findings were

clearly erroneous would be the same whether or not the Master who made the findings had seen and heard the witnesses. In neither case would the trial Court have seen or heard them, and Respondents submit that this contention of Petitioners is likewise without merit.

It is, therefore, Respondents' position that (1) there is no requirement in the Constitution or in the authorities that in a case such as this the successor Master must see and hear the witnesses—even though neither party requests that he do so—and that if he does not do so there is a lack of due process and (2) Petitioners waived the right to a de novo hearing (if they ever had any such right), and in effect acquiesced in the successor Master's finding the facts on the basis of the testimony taken by the original Master. Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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On this the 13th day of August, 1964, two copies of the foregoing Reply were mailed by me to each of the

counsel for Petitioners, namely: Robert C. Howell, Esq., Vaughn Building, Austin, Texas; Jake Jacobsen, Esq., Vaughn Building, Austin, Texas; and Arthur Mitchell, Esq., Suite 400, First Federal Savings Building, Austin, Texas.

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